IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WEST GOSHEN SEWER AUTHORITY Plaintiff, v. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al., Defendants, and DELAWARE RIVERKEEPER NETWORK 925 Canal Street, Suite 3701 Bristol, PA 19007, Proposed Intervenor-Defendant.	)	Civil Action No. 2:12-cv-05353-JS

MEMORANDUM IN SUPPORT OF MOTION TO INTERVENE

Pursuant to Federal Rules of Civil Procedure 24(a)(2) and 24(b)(1)(B), the Delaware Rivekeeper Network (DRN) submits this memorandum in support of its Motion to Intervene. In this action, the West Goshen Sewer Authority (WGSA) seeks to vacate the Total Maximum Daily Load (TMDL) for Goose Creek which the United States Environmental Protection Agency (EPA) established pursuant to the Clean Water Act (CWA). EPA established this TMDL in accordance with the terms of a consent decree obtained through DRN's litigation efforts to restore waters used by its members. DRN seeks to intervene to defend the validity of the TMDL. It is DRN's position that the CWA not only authorized but *required* EPA to establish the TMDL. Furthermore, EPA relied on adequate data, science, and methods in establishing the TMDL, satisfying the requirements of the CWA and Administrative Procedure Act (APA).

I. Background

Congress enacted the CWA "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). To achieve this goal, Congress required the states to develop water quality standards, and to establish TMDLs for waters failing

to meet those standards. *See* 33 U.S.C. § 1313. Congress required EPA to develop water quality standards and TMDLs where states failed to meet those obligations adequately in EPA's determination. 33 U.S.C. § 1313(d)(2).

A TMDL is a calculation of the maximum quantity of a pollutant that can be added to a waterbody from all sources, including natural background sources, without exceeding the applicable water quality standard for that pollutant. 33 U.S.C. § 1313(d)(1)(C); 40 C.F.R. § 130.2(e)-(i). The CWA requires states to adopt water quality standards. 33 U.S.C § 1313(a)-(c). Water quality standards are regulations establishing: (1) the designated use(s) of the water body; and (2) the numeric or narrative water quality criteria to protect and maintain those uses. 40 C.F.R. §§ 131.3(i), 131.6. The CWA requires that states submit a biennial[1] report to EPA that: (1) details whether the designated uses are being met; (2) identifies "impaired waters" or "water-quality-limited segments" (WQLS), which are waters failing to meet water quality standards despite full compliance by dischargers with their permits; and (3) ranks the WQLS based on pollution severity and water body use. 33 U.S.C. §§ 1315(b), 1313(d)(1)(A); 40 C.F.R. § 130.7(d)(1).[2] Once impaired waters have been identified and prioritized, states must prepare a TMDL for each pollutant impairing each WQLS, and submit each TMDL to EPA for approval. 33 U.S.C. § 1313(d)(1)(C), (d)(2). If EPA disapproves a TMDL, EPA must prepare its own TMDL for that water within 30 days. *Id.*; 40 C.F.R. § 130.7(d)(2). A state's failure to establish TMDLs can also trigger EPA's duty to do so. *See, e.g.*, *Scott v. City* of *Hammond*, 741 F.2d 992,

[1] Section 303(d)(1) requires the submission of the WQLS lists and TMDLs "from time to time", which EPA has interpreted to mean every two years for lists, and by state-EPA agreements for TMDLs. *See* 33 U.S.C. § 1313(d)(1); 40 CFR § 130.7(d)(1).

[2] Once this report has been submitted to EPA, EPA has 30 days to approve or disapprove the lists. 33 U.S.C. § 1313(d)(2). If EPA disapproves the list, EPA must prepare its own list within 30 days. 33 U.S.C. § 1313(d)(2); 40 C.F.R. § 130.7(d)(2).

996 (7th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985). When establishing a TMDL, EPA must provide notice and consider public comments. 40 C.F.R. § 130.7(d)(2). *See* 33 U.S.C. § 1251(e).

In 1996, the American Littoral Society, operating through DRN as its local affiliate, filed suit against EPA to compel the Agency to prepare TMDLs for impaired Pennsylvania waters based on the state's failure to establish TMDLs. In 1997, as part of the settlement of that lawsuit, EPA agreed to a specified timeframe for developing or approving TMDLs for impaired waters listed by the Pennsylvania Department of Environmental Protection (PADEP) in its 1996 submission to EPA. *See Am. Littoral Soc'y and PIRG of Pennsylvania v. EPA*, No. 96-489 (E.D. Pa. 1997); Exhibit A (Consent Decree). Through a Memorandum of Understanding (MOU) between EPA and Pennsylvania, Pennsylvania subsequently asserted that, due to a lack of technical resources, it would not be able to establish a TMDL for the impaired waters in the Chester Creek Watershed, of which Goose Creek is part; EPA and the state agreed that EPA would establish the TMDL in light of the state's inability to comply with the CWA. Thus, in partial fulfillment of the Consent Decree and pursuant to the MOU, on June 30, 2008, EPA established the phosphorous TMDL for Goose Creek that is the subject of WGSA's challenge.

I. Argument

As discussed below, DRN is entitled to intervene as of right. DRN's Motion to Intervene is timely, DRN possesses a legally cognizable interest, this interest may be impaired by the litigation, and EPA does not adequately represent DRN's interests. In the alternative, permissive intervention is warranted.

A. DRN IS ENTITLED TO INTERVENE AS OF RIGHT

Rule 24 of the Federal Rules of Civil Procedure governs intervention in an existing lawsuit. A movant may intervene as of right under Rule 24(a)(2).

> On timely motion, the court must permit anyone to intervene who . . . claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.

Fed. R. Civ. P. 24(a)(2). In the Third Circuit, to intervene under Rule 24(a)(2), a movant must establish: 1) a timely application for leave to intervene; 2) a sufficient interest in the underlying litigation; 3) a threat that the interest will be impaired or affected by the disposition of the underlying action; and 4) that the existing parties to the action do not adequately represent the prospective intervenor's interests. *Liberty Mut. Ins. Co. v. Treesdale, Inc.*, 419 F.3d 216, 220 (3d Cir. 2005) (citing *Kleissler v. U.S. Forest Serv.*, 157 F.3d 964, 969 (3d Cir. 1998)). The movant must satisfy all four requirements. *Id.* (quoting *Mountain Top Condo. Assoc. v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 366 (3d Cir. 1995)). "[C]ase law in the Third Circuit indicates that Article III standing is not a prerequisite for intervention as a matter of right." *Am. Farm Bureau Fedn v. United States EPA*, 278 F.R.D. 98, 111 n.6 (M.D. Pa. 2011).[3]

As discussed below, DRN meets each of the requirements for intervention as of right.

1. DRN's MOTION TO INTERVENE IS TIMELY

DRN's motion is timely because the proceedings are at an early stage, the proceedings will not be delayed prejudicially, and DRN filed promptly upon learning of the litigation.

The Third Circuit has established three factors for courts to consider when determining whether an intervention motion is timely: "(1) the stage of the proceeding; (2) the prejudice that delay may cause the parties; and (3) the reason for the delay." *Benjamin v. Dep't of Pub. Welfare of Pa.*, 701 F.3d 938, 949 (3d Cir. 2012) (quoting *Mountain Top*, 72 F.3d at 369). "The delay

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[3] *See Am. Auto. Ins. Co. v. Murray*, 658 F.3d 311, 318 n.4 (3d Cir. 2011) (noting that neither the Supreme Court nor the Third Circuit have indicated that Article III standing is a requirement for Rule 24 intervention, and that there is a circuit split on this issue); *Hartford Casualty Ins. Co. v. Cardenas*, --- F.Supp.2d ----, 2013 WL 1158590, at *3 (E.D.Pa. Mar. 21, 2013) (relying on *Murray* to note that the Third Circuit has yet to require Article III standing for intervenors).

should be measured from the time the proposed intervenor knows or should have known of the alleged risks to his or her rights or the purported representative's shortcomings." *Id.* at 950. "The mere passage of time, however, does not render an application untimely." *Id.* (quoting *Mountain Top*, 72 F.3d at 369.) The Third Circuit has noted that, "the critical inquiry is: what proceedings of substance on the merits have occurred?" *Mountain Top*, 72 F.3d at 369 (allowing intervention as of right where four years passed between the filing of the complaint and the motion to intervene, but there were no depositions taken, dispositive motions filed, or decrees entered yet).

Where the proceedings are at an early stage, such that no decisions on the merits have yet been considered by the court, and no prejudice to the parties can result from the delay in intervening, a court may find the motion to intervene timely even where the movant offers no good reason for not intervening earlier. *Jet Traders Inv. Corp. v. Tekair, Ltd.*, 89 F.R.D. 560, 568 (D.Del. 1981) ("although [movant] has presented no good reason for the eight month delay between the completion of the pleadings and its motion to intervene, it is clear that where discovery has not been completed, there have been no significant decisions on the merits considered or decided, and the parties could not be prejudiced by that delay, the motion must be considered timely.")[4]

Even where the proceedings are at an advanced stage, an intervenor may still prevail by "convincingly explain[ing] its reason for the delay in filing its motion to intervene." *Choike v. Slippery Rock Univ. of Pa*, 297 F. App'x. 138, 141 (3d Cir. 2008)[5]. In *Choike*, the Third Circuit

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[4] *But see Kitzmiller v. Dover Area Sch. Dist.*, 229 F.R.D. 463, 466–67 (M.D.Pa. 2005) (denying intervention as of right due to timeliness seven months after the initial complaint was filed and while discovery was still pending because the would-be intervenor knew of the suit from inception and gave no reason for the delay).

[5] Citing *In re Fine Paper Antitrust Litig.*, 695 F.2d 494, 500 (3d Cir.1982) (noting that motion to intervene filed after entry of decree requires showing of extraordinary circumstances).

upheld the denial of a motion to intervene in a class action where discovery had closed, the parties had filed a settlement agreement with the court before the motion to intervene was filed, and both the filing of the complaint and the grant of a preliminary injunction six months later had generated "some publicity," such that there was no justification for the delay. *See id.*

Here, the proceedings are still at an early stage. Plaintiff filed its complaint on September 19, 2012 and EPA answered on November 19, 2012. Although, on April 8, 2013, EPA filed a motion to dismiss two of the four claims asserted by plaintiffs, the motion sought only to narrow the issues to be considered on the merits, not dispose of the case altogether. Furthermore, plaintiff has yet to respond to the motion due to the stay of the proceedings for settlement discussions, and no other dispositive motions have been filed or considered by the Court. It is DRN's understanding that the parties have yet to reach a settlement agreement, and that a conference is scheduled for July 8th to discuss the status of the case.

DRN's intervention at this stage will not prejudice the parties. As this is an administrative record matter, there are no concerns about collateral or protracted discovery resulting from the intervention. EPA has already produced the administrative record to support its decision. DRN's intervention will not result in any additional discovery. As evinced by its proposed answer which is being submitted contemporaneously, DRN does not intend to raise any collateral issues. The effect of DRN's intervention will be that DRN will have the opportunity to file briefs advancing its view of the law and facts already placed at issue by the parties, and will have a voice regarding potential settlement agreements.

Finally, DRN first learned of the present litigation on May 16, 2013 from an anonymous caller reporting pollution. *See* Ex. B at ¶12. Because the present litigation was not generally publicized, prior to that call, DRN was unaware that the challenge had been filed. *See id.*

Thus, because there have been no proceedings on the merits, the resolution of the litigation will not be set-back by DRN's intervention, and because DRN filed to intervene within weeks of learning of the unpublicized litigation, the motion is timely.

2. DRN POSSESSES A LEGALLY COGNIZABLE INTEREST

Because DRN undertook legal action to fight for the establishment of the Goose Creek TMDL to protect the interests of its members in the use and enjoyment of the Chester Creek Watershed, DRN has a sufficient interest to warrant intervention as of right.

A proposed intervenor must show "a tangible threat to a legally cognizable interest." *Mountain Top*, 72 F.3d at 366. "[I]ntervenors should have an interest that is specific to them, is capable of definition, and will be directly affected in a substantially concrete fashion by the relief sought . . . The facts assume overwhelming importance[.]" *Kleissler*, 157 F.3d at 972.

In a case with facts closely aligned to the present matter, *Am. Farm Bureau Fedn v. U.S. EPA*, 278 F.R.D. 98, 107 (M.D. Pa. 2011), numerous environmental groups sought to intervene in an industry challenge to the legitimacy of TMDLs EPA established for the Chesapeake Bay. The District Court granted intervention as of right, finding that the environmental groups had a sufficient legally cognizable interest based on their members' personal use of the Bay, coupled with the groups' "past legal, educational, and physical efforts to protect and restore the Bay." *Id.* These efforts included litigation against EPA that resulted in a settlement agreement setting a deadline for the establishment of the TMDL for the Bay. *Id* at 106.

In *Am. Farm*, the court looked to the decisions of numerous Courts of Appeal that have recognized the right of special interest groups to intervene as of right where particular interests championed by the group are threatened. *Id.* at 106-107. For example, the Ninth Circuit has established that "[a] public interest group is entitled as a matter of right to intervene in an action

challenging the legality of a measure it has supported." *Idaho Farm Bureau v. Babbitt*, 58 F.3d 1392, 1397 (9th Cir. 1995) (citing *Sagebrush Rebellion, Inc. v. Watt*, 713 F.2d 525, 528 (9th Cir.1983) (Audobon Society entitled as a matter of right to intervene in an action challenging the legality of Secretary of Interior's creation of a conservation area because of group's prior support for the conservation area and interest in protecting animals and their habitats)); *Washington State Bldg. & Constr. Trades Council v. Spellman*, 684 F.2d 627, 630 (9th Cir.1982) (holding that "the public interest group that sponsored an initiative [to limit the amount of radioactive waste entering state] . . . was entitled to intervention as a matter of right" in an action challenging the limit). Other Circuits have also recognized intervention as of right under such circumstances.[6]

DRN is a not-for-profit organization established in 1988 whose purpose is to protect, preserve, and enhance the Delaware River, all of its tributary streams, and the habitats and communities of the Delaware River Watershed, which encompasses the Goose Creek Watershed. DRN has over 10,000 members, many of whom live and recreate in the Delaware River Watershed; numerous DRN members live near, and recreate in, the Goose Creek Watershed. *See*

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[6] *See, e.g., Utah Assoc. of Counties v. Clinton,* 255 F.3d 1246, 1252 (10th Cir. 2001) (granting several environmental interest groups intervention as of right in action challenging a presidential proclamation establishing national monument, finding movants' interest in protecting public lands and assuring their continued integrity sufficient for intervention as of right); *Coalition of Arizona/New Mexico Counties for Stable Economic Growth v. Dep't of the Interior*, 100 F.3d 837, 841 (10th Cir. 1996) (individual who studied and photographed the Spotted Owl had sufficient interest to intervene in a suit against the U.S. Fish and Wildlife Service challenging its decision to protect the Owl under the Endangered Species Act because his "involvement with the Owl in the wild and his persistent record of advocacy for its protection amounts to a direct and substantial interest . . . for the purpose of intervention as of right"); *Mausolf v. Babbitt,* 85 F.3d 1295, 1302 (8th Cir.1996) (granting intervention to conservation groups in suit seeking to enjoin the enforcement of restrictions on snowmobiling in a national park, finding the conservation groups' interest in the park's well-being and efforts to protect that interest are sufficient for intervention as of right); *Hazardous Waste Treatment Council v. South Carolina (In re Sierra Club)*, 945 F.2d 776, 779 (4th Cir.1991) (holding that an environmental organization that was a party to an administrative permit proceeding was entitled to intervene as a matter of right in an action challenging the constitutionality of a governing state regulation).

Ex. B at ¶¶ 13, 16. DRN has advocated and litigated to ensure effective enforcement of the CWA to protect the interests of its members who use and enjoy the streams within the watershed for recreational purposes. DRN also conducts water quality monitoring and restoration projects to protect water quality. Until 2009, DRN operated under the American Littoral Society (ALS) as a local affiliate office of that organization. *See* Ex. B at ¶ 4. As discussed above, in its role as the operational affiliate of ALS, in 1997, DRN entered into a consent decree with EPA in which EPA agreed to approve or establish TMDLs for waters on PADEP's 1996 list of impaired waters. *See* Ex. A; Ex. B at ¶¶ 5-9. The 1996 list included the upstream portion of Chester Creek, which constitutes Goose Creek. DRN efforts to ensure that TMDLs would be developed for impaired waters in the Delaware River Watershed thereafter have included commenting on PADEP's 1998 list of impaired waters regarding the improper removal of segments listed on the 1996 list, filing a notice of intent to bring action against EPA for failing to timely approve or reject the 1998 list, conducting water quality monitoring submitted to PADEP in 1999 to support the listing of additional segments in the Delaware River Watershed, meeting with EPA in 2002 regarding Pennsylvania's impairment lists, and commenting on the 2010 lists and on PADEP's 2012 identification of impaired waters. *See* Ex. B at ¶ 10. As the Consent Decree involved a twelve-year timetable for establishing TMDLs, which was later extended by two years, DRN continued to be involved in monitoring the status of EPA's development of TMDLs for Pennsylvania through September 2011. *See* Ex. B at ¶ 11. The completion of the Goose Creek TMDL in 2008 was one of many TMDLs established by EPA to satisfy its obligations under the Consent Decree.

Like the environmental organizations in *Am. Farm,* DRN fought to establish TMDLs for the benefit of its members. Because of those efforts, DRN has a legally cognizable interest sufficient to support intervention as of right to defend those TMDLs.

3. THIS INTEREST MAY BE IMPAIRED BY THE LITIGATION

Because vacatur of the TMDL would further delay the restoration of Goose Creek, DRN's interests might be impaired by the litigation. Proposed intervenors must demonstrate that their interest might become affected or impaired, as a practical matter, by the disposition of the action. *Mountain Top,* 72 F.3d at 368. Here, Plaintiff seeks vacatur of the TMDL, and argues that EPA lacked authority to establish the TMDL even where the state has asked EPA to do so because the state lacks the technical resources to set the TMDL.

Vacating the TMDL would impair DRN's interests in protecting the waters of Goose Creek by negating the benefits it obtained through the 1997 Consent Decree, which required a TMDL to be established for Goose Creek by a set deadline. One effect of a TMDL is that the TMDL must be taken into account by the state in setting the terms of National Pollutant Discharge Elimination System (NPDES) permits issued pursuant to the CWA.[7] Vacatur of the TMDL would mean that there would be no requirement on the state to incorporate the TMDL into effluent limits in NPDES permits for parties discharging phosphorous into Goose Creek. Without more stringent requirements on phosphorous discharges, these permittees will be able to continue discharging phosphorous into Goose Creek at levels that EPA and PADEP have identified as causing harm to the designated use of the water for aquatic life, resulting in the continued impairment of the water. This impairment is an on-going harm to the recreational and aesthetic interests of the many DRN members who live and recreate in the Goose Creek Watershed. *See* Ex. B at ¶¶ 13-14. DRN's efforts to address this harm would be deprived of

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[7] *See* 40 C.F.R. §§ 122.44(d)(1)(vii)(B)(requiring that terms of permit include any requirements needed to meet water quality standards, including waste load allocations established pursuant to TMDL development), (d)(6)(requiring terms of NPDES permits be consistent with state Water Quality Management (WQM) plan), 130.7(d)(2)(requiring state to incorporate TMDLs into WQM plan), 130.12(a)(requiring NPDES permits be consistent with WQM plan).

effect if the TMDL is vacated, further delaying the imposition of more stringent requirements on phosphorous in NPDES permits. Thus, the present litigation may impair DRN's efforts to ensure the restoration of Goose Creek.

4. EPA DOES NOT ADEQUATELY REPRESENT DRN'S INTEREST

Because EPA must represent a broad spectrum of concerns, some of which conflict with DRN's interests, EPA does not adequately represent DRN as to the Goose Creek TMDL.

Although intervention as of right requires the movant to establish inadequacy of representation, the Third Circuit has stated that "the burden of making that showing should be treated as minimal." *Benjamin*, 701 F.3d at 958. Whereas there is a presumption that the government is an adequate representative "when the concerns of the proposed intervenor, e.g., a 'public interest' group closely parallel those of the public agency," *Kleissler*, 157 F.3d at 972, "when an agency's views are necessarily colored by its view of public welfare rather than the more parochial views of a proposed intervenor whose interest is personal to it, the burden is comparatively light." *Benjamin*, 701 F.3d at 958. "Moreover, an intervenor need only show that representation *may* be inadequate, not that it is inadequate." *Am. Farm*, 278 F.R.D. at 110 (citing *Trbovich v. United Mine Workers*, 404 U.S. 528, 538, n.10, 92 S. Ct. 630, 30 L. Ed. 2d 686 (1972); *Kleissler*, 157 F.3d at 972.) "The possibility that the interests of the applicant and the parties may diverge 'need not be great' in order to satisfy the minimal burden." *Id.* (quoting *Utah Assoc. of Counties*, 255 F.3d at 1254.)

The Third Circuit has held that a government agency's duty to serve the broad public interest can preclude it from adequately representing a particular group of citizens. *See Kleissler* 157 F.3d at 973–74 ("the government represents numerous complex and conflicting interests in matters of this nature" and "[t]he straightforward . . . interests asserted by intervenors here may

become lost in the thicket of sometimes inconsistent governmental policies"). In *Am. Farm*, the District Court found that the interests of environmental groups seeking to intervene in an action to vacate a TMDL were inadequately represented by EPA because "EPA represents the broad public interest," encompassing not only environmental protection interests but also the conflicting interests of the regulated community, and because previous CWA litigation between the groups and EPA showed the divergence of their interests. 278 F.R.D. at 110-111.

DRN's interests in preventing the vacatur of the TMDL differ from EPA's in a number of ways. First, EPA is subject to political pressures and budget constraints that may affect how vigorously it will defend the TMDL; DRN, as a privately funded organization dedicated solely to environmental protection, is not subject to the same pressures. *See Kleissler*, 157 F.3d at 974 (acknowledging that government agency's representation is subject to policy shifts, whereas intervenor's interests were unlikely to change).

Second, if the Court rules against EPA, EPA might not appeal the decision, and DRN would be without recourse to correct what would amount to a nullification of the benefits of the 1997 Consent Decree. *See id.* at 973 (noting that possibility that agency might not appeal created "legitimate pause" with regard to whether agency would adequately represent intervenors).

Third, DRN, operating as an affiliate of the American Littoral Society, has repeatedly sued EPA for its inadequacy in carrying out the mandates of the CWA in respect to TMDLs.[8] As discussed above, the Goose Creek TMDL itself was established as a result of the settlement of DRN's litigation to compel EPA to carry out those mandates, demonstrating that EPA and DRN's interests are not aligned with respect to the TMDL requirements of the CWA. *See*

[8] *See Am. Littoral Soc'y v. United States EPA*, 199 F. Supp. 2d 217, 239 (D.N.J. 2002); *Am. Littoral Soc'y v. U.S. EPA*, No. 96-330 (D. Del. 1997); *Am. Littoral Soc'y and PIRG of Pennsylvania v. EPA*, No. 96-489 (E.D. Pa. 1997).

Mausolf v. Babbitt, 85 F.3d 1295, 1303 (8th Cir. 1996) (environmental group seeking to intervene in challenge to regulations rebutted presumption that agency would adequately represent interests where the regulations were attributable to litigation by that same environmental group). At the very least, the past litigation demonstrates that DRN and EPA have divergent views of the extent of EPA's duties under the CWA and would likely proffer different legal arguments as to EPA's authority to set a TMDL given state inaction.

Fourth, EPA may settle the litigation in a manner that compromises DRN's interest that any revision of the TMDL be accomplished through public notice and comment procedures. DRN is concerned that EPA may agree to measures that would weaken the TMDL without giving the public the opportunity to comment that is inherent in EPA regulations and the CWA. *See* 40 C.F.R. § 130.7(d)(2). *See also* 33 U.S.C. § 1251(e); 40 C.F.R. § 25.3. Because the formal amendment of the TMDL could require EPA to devote resources to respond to public comment, EPA has an incentive to circumvent the public interest in participation, whereas DRN's interests are aligned with ensuring public participation. Thus, because DRN's interests diverge from EPA's, intervention as of right is appropriate.

B. ALTERNATIVELY, PERMISSIVE INTERVENTION IS WARRANTED

Even where intervention as of right is unavailable, Rule 24(b)(1)(B) provides that "[o]n timely motion, the court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1)(B). "In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3).

"In deciding whether to permit intervention under Rule 24(b), 'courts consider whether the proposed intervenors will add anything to the litigation.'" *Am. Farm*, 278 F.R.D. at 111

(quoting *Kitzmiller*, 229 F.R.D. at 471). In *Am. Farm*, the District Court, holding that environmental groups also satisfied the criteria for permissive intervention to defend TMDLs for the Chesapeake Bay, stated "given the complexity and voluminous size of the administrative record, which includes scientific models . . . the intervenors may serve to clarify issues and, perhaps, contribute to resolution of this matter." *Id.*

Here, DRN, as intervening Defendants, will argue in favor of the validity of the Goose Creek TMDL pursuant to the CWA and Administrative Procedure Act. These arguments are completely congruent with the legal issues implicated in the main action between Plaintiffs and EPA, thus DRN's defenses share common questions of law and fact with the main action. As discussed above, intervention will neither unduly delay the proceedings nor prejudice the adjudication of the original parties' rights. Finally, DRN, in presenting a view of the administrative record that may differ from either Plaintiff or EPA's, may clarify issues that the parties would obscure, and thereby contribute to the resolution of complex issues in the case.

CONCLUSION

DRN meets the criteria for intervention as of right under Rule 24(a)(2) and permissive intervention under Rule 24(b). Accordingly, DRN respectfully requests that this Court grant its motion to intervene as a matter of right or, in the alternative, permissively.

DATED: June 10, 2013

Respectfully submitted,

Filed Electronically

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